No. 13-1441

In The
Supreme Court of the United States

CITY OF INDIANAPOLIS,

Petitioner,

v.

ANNEX BOOKS, INC., *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Seventh Circuit properly analyze the record before it and follow the framework set out in *City of Los Angeles v. Alameda Books, Inc.*, 545 U.S. 425 (2002), in applying intermediate scrutiny and concluding that the evidence did not justify Indianapolis's law requiring adult bookstores to close between midnight and 10 a.m. during the week and to remain closed all day on Sunday?

2. Is a law that defines an adult bookstore as any retail business having as little as 25% of its inventory or its floor space in adult material, or deriving only 25% of its weekly revenue from the sale of adult material, unconstitutionally overbroad?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that Melo, Inc., is the parent of Annex Books, Inc., Lafayette Video & News, Inc., Keystone Video & Newsstand, Inc., and New Flicks, Inc. No publicly traded company owns stock in any of the corporate parties or its parent.

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STATEMENT OF THE CASE

Respondents Annex Books, Inc., Keystone Video & Newsstand, Inc., and Lafayette Video & News, Inc., are businesses located in Indianapolis, Indiana, that offer constitutionally protected, sexually oriented DVDs and other adult media for sale to the public, as well as other merchandise. Respondent New Flicks, Inc., was engaged in the same business until December 2010, when it closed because it could no longer generate a profit. Tr. 35-38. Annex Books also has coin-operated machines with which its patrons may view sexually oriented videos on the store's premises. *Ibid*.

Indianapolis Ord. 87,2003 ("the Ordinance") defines an adult bookstore as:

> an establishment having at least twenty-five percent (25%) of its (1) retail floor space used for the display of adult products; or (2) stock in trade consisting of adult products or (3) weekly revenue derived from adult products.

App. at 104.[1]

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[1] Before Indianapolis adopted Ord. 87,2003, Chapter 807 of the Revised Code of the Consolidated City and County of Indianapolis, Marion County, defined an adult bookstore as:

> an establishment having as a preponderance of its stock in trade or its dollar volume in trade in books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representations which are distinguished or

(Continued on following page)

Respondent Annex Books had been classified as an adult bookstore before the Ordinance was enacted; Respondents Keystone, Lafayette and New Flicks, however, had not.[2] But the Ordinance classified them as such and as a result, they, along with Annex Books, became subject to the Ordinance's regulatory provisions, including the requirement that adult bookstores close between midnight and 10:00 a.m. Monday through Saturday, and remain closed all day on Sunday. App. at 121.

The Ordinance's closing hours provision was enforced for four years before there was a trial, and that circumstance presented a unique opportunity to ascertain whether Indianapolis's asserted rationale for the law – the reduction in crime in the area surrounding the Bookstores – was actually supported by evidence and by its experience.

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characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

[2] These three retail businesses had less than a preponderance of their stock in trade in adult media. At the trial, the City pointed out that their revenue derived from adult media might have brought them within the definition, however.

The Evidence at Trial

In 2009, Indianapolis did a crime study that measured the UCR Part I crimes plus the crime of simple assault, that took place within a 500 foot radius of each of the Bookstores for a 38 month period of time before, and a 34 month period after, the Ordinance was enforced.[3] Indianapolis's crime study also compared how crime fared in the areas surrounding the four stores with the balance of the Indianapolis Police District. Plaintiffs' Ex. 7; Tr. 397-403; 477-79.

The Bookstores introduced Indianapolis's 2009 crime study into evidence because it showed that when the law was enforced, instead of going down, crime in the area around the Bookstores increased by 12% during the overnight hours they were required to be closed, and increased dramatically on Sundays by 37% when the stores were closed all day.[4] The City's

[3] Uniform Crime Report (UCR) information is collected by police departments across the country and reported to the Department of Justice annually. The Part I crimes catalogued by Indianapolis were aggravated assault, forcible rape, homicide, robbery. The property crimes collected were arson, burglary, larceny/theft and motor vehicle theft.

[4] When adjusted to account for the different lengths of the before and after time periods by computing the average number of incidents per month, crime around the Bookstores increased 24.72% during the overnight hours and 53.42% on Sundays. Pl. Ex. 7A.

study also compared crime around the Bookstores to the rest of the Indianapolis Police District and showed that crime rose at a higher rate in the area around the Bookstores during the restricted hours and on Sunday than it did in the rest of the City, where it rose only 10% between midnight and 10 a.m., and dropped 2% on Sunday. Pl. Ex. 7.

When Indianapolis shifted its theory and sought to justify the hours restriction not on a reduction in ambient crime, i.e., the claimed secondary effect of crime *around* the Bookstores, but on the ground that it reduced the number of armed robberies at the Bookstores themselves, the evidence showed that the raw numbers of *all* types of crime at the Bookstores during the 53 month period before the Ordinance went into effect was small.

Specifically, records produced by the city's crime analyst from January 1, 2001 through May 31, 2005, showed the following:

1/1/2001 THROUGH 5/31/2005 (Pre-Enforcement)

	Total Incidents	Average Incidents per month	Number Incidents Midnight to 10 a.m.	Average Incidents per month Midnight to 10 a.m.	Number Incidents Sunday	Average incidents per month on Sunday
Lafayette	17	0.32	8	.15	1	.02
New Flicks	7	0.13	2	.04	0	0
Keystone	23	.43	5	.09	5	.09
Annex	87	1.64	10	.19	4	.08

Pl. Ex 9A.

The city's information also allowed one to compare what happened at the Bookstores when the closing hours were enforced during the period June 1, 2005 through December 2, 2009. Plaintiffs' Exhibit 9 showed that between midnight and 10 a.m., the number of crime incidents at the stores was as follows:

	Before	After
Lafayette	8	3
New Flicks	2	2
Keystone	5	7
Annex	10	2

Pl. Ex. 9; Tr. 425-26.

Exhibit 9 also showed that the number of incidents at the Bookstores on Sunday was small as well:

	Before	After
Lafayette	1	1
New Flicks	0	0
Keystone	5	4
Annex	4	0

The city's crime analyst testified that all retail establishments in Indianapolis, from grocery stores and drug stores to convenience stores to gas stations, can fall victim to robberies and larcenies. Tr. 427-28. Other area businesses had more crimes than the Bookstores, but were not required to close: A CVS drug store in the area around Keystone had 42 crimes, including 6 armed robberies, 3 times the number of

crimes that Keystone had. Near Annex, Menard's, a department store, had 149 crimes reported, including an armed robbery and 6 strong arm robberies. Def't Ex. M-6; Tr. 507.

And the underlying police reports for the crimes in the area around the Bookstores showed that except when the Bookstores themselves were crime victims, the offenses in their vicinity before the Ordinance was enforced had nothing to do with them at all. Specifically, Plaintiffs' Exhibit 7, the city's 2009 crime study, showed that during all hours and days of the pre-enforcement period, there were 107 violent/person crimes in the 500 foot area around the Bookstores. The city's Exhibit M-5 showed that the Bookstores and the Video Gallery[5] were the victims in 21 of those incidents.

The reports for 79 of the remaining 86 violent/person crimes that could be found showed no nexus between the incidents they reported and the Bookstores. Rather, those reports documented cases of, among other things, domestic violence, incidents at a drug treatment center, fights at various businesses, and even an incident involving two children getting into a fight while getting off of a school bus. Def't Ex. M-2.

Indianapolis's Exhibit M-4, which used a slightly different time frame than Plaintiffs' Exhibit 9, also

[5] Video Gallery, which is not a party to this case, is an adult bookstore adjacent to Annex Books.

showed that there was no meaningful reduction in crime when the Ordinance was enforced. That chart documented the number of incidents during a 38 month pre-enforcement period, from April 1, 2002 through May 31, 2005, and compared them to a 34 month post-enforcement period, from June 1, 2005 through March 31, 2008:

STORE	Total	Unregulated hours	Midnight to 10 a.m.	Sunday
LAFAYETTE VIDEO				
4/1/02-5/31/05	8	2	5	1
6/1/05-3/31/08	6	5	0	1
NEW FLICKS				
4/1/02-5/31/05	3	3	0	0
6/1/05-3/31/08	2	1	1	0
KEYSTONE VIDEO				
4/1/02-5/31/05	11	3	3	5
6/1/05-3/31/08	10	5	3	2
ANNEX BOOKS				
4/1/02-5/31/05	9	5	3	1
6/1/05-3/31/08	2	1	1	0
VIDEO GALLERY				
4/1/02-5/31/05	5	3	1	1
6/1/05-3/31/08	1	1	0	0
Total 4/1/02-5/31/05	36	16	12	8
Total 6/1/05-3/31/08	21	13	5	3

Def't Ex. M-4.

The testimony and evidence also established that the hours restrictions could not be justified by the claim of eliminating vice offenses at the Bookstores. Specifically, two Indianapolis Metropolitan Police Department officers who, for many years, were involved with vice investigations, testified that the three bookstores that did not have viewing booths – Keystone, New Flicks and Lafayette – were not a source of vice crime before the Ordinance was enacted. No evidence of prostitution, drug trafficking, public indecency or other vice crimes occurred there, and not a single arrest had been made at any of those retail businesses for those crimes. Tr. 59-62; 88-90.

And as to Annex, they testified that no drug or prostitution arrests had been made there, either. They also testified that while a number of arrests of patrons had been made in the viewing booth area of the store for acts of public indecency, a separate provision of the Ordinance, which required the viewing booth area to be reconfigured so that the interior of the booths was visible, fully and completely ameliorated that problem. After the booths were reconfigured, there were no problems of public indecency. Tr. 96; App. at 117-19. They re-emphasized the crime analyst's testimony that none of the public indecency arrests there had taken place during the hours that the Ordinance required the Bookstores to be closed or on Sundays.

The Decision Below

The Seventh Circuit reviewed the entire record and concluded, based on the evidence, that the closing hours requirement in the Ordinance was unconstitutional under the First and Fourteenth Amendments utilizing the framework established in *City of Renton v. Playtime Theatres, Inc.*,475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

For the reasons set out below, the petition should be denied.

REASONS FOR DENYING THE PETITION

This Court's decisions in *Renton* and *Alameda Books* contemplate that the outcome of a case like this will depend on the evidence presented. Indeed, both the plurality and the concurrence in *Alameda Books* proceed on the premise that the evidence matters, and the outcome of any particular case is not preordained. *Id.* at 438-39 (plurality); *Id.* at 444 (Kennedy, J., concurring).

The Seventh Circuit's decision is faithful to that premise. The court simply reviewed all of the evidence in the record and concluded that the Ordinance did not satisfy intermediate scrutiny. The court did not hold Indianapolis was required to support its law with "highly specific, statistically significant evidence," as the petition states. Rather, it properly and

correctly pointed out the weaknesses in the statistical evidence offered by the city to support its contention that the closing hours ordinance could be justified as a means to reduce armed robberies at the stores. That is far different from holding that the *only* evidence the City could present to justify an hours of operation regulation is "highly specific, statistically-significant empirical evidence."

The single question tendered by the Petitioner – "Whether, to satisfy the First Amendment as applied in *Renton* and its progeny, an hours of operation regulation targeting negative secondary effects must be supported by highly specific, statistically-significant empirical evidence" – is thus not presented by this case or what the court below held. The court said only that the city's evidence of armed robberies was weak as a statistical matter. Because the single question tendered is not actually presented by this case, for that reason alone, the petition should be denied. *See* S. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

I. THE SEVENTH CIRCUIT'S DECISION IS BASED ON THE EVIDENCE PRESENTED AT TRIAL AND FOR THAT REASON, DOES NOT CONFLICT WITH THE ANALYSIS EMPLOYED BY OTHER COURTS.

In *Alameda Books*, the Court determined that the government bears the burden of producing evidence

that adult uses cause the asserted adverse secondary effects and that the proposed regulation is a reasonable measure to reduce that particular effect. *Id.* at 438. While noting that a city did not have the burden of ruling out every possible theory that is inconsistent with its own, the plurality emphasized:

> This is not to say that a municipality can get away with shoddy data or reasoning. *The municipality's evidence must fairly support the municipality's rationale for its ordinance*. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (citations omitted) (emphasis added).

Petitioner claims that the court below demanded that it present "highly specific, statistically-significant empirical evidence" to prevail, and that in assessing the trial record, the Seventh Circuit "made up its own rule, creating conflicts with every other federal and state appellate court to address the *Renton-Alameda* standard for reviewing secondary effects evidence." Petition at i, 13.

To the contrary, the Seventh Circuit did not impose a heightened burden on Indianapolis. Its decision represents a straightforward application of this Court's decisions to the evidence that was presented at trial. That evidence undermined Indianapolis's asserted rationale for the closing hours provision.

What is more, the courts whose decisions are claimed to conflict with the Seventh Circuit also recognize that when a law claimed to be aimed at combating secondary effects is challenged, the outcome is fact dependent and not preordained.

The Sixth Circuit, in *Richland Bookmart, Inc. v. Knox Cty, Tenn*, 555 F.3d 512 (6th Cir. 2009), recognized that the resolution of a case challenging a law ostensibly aimed at ameliorating adverse secondary effects will depend on the record adduced at the trial:

> This is not to say that, provided that the now-standard list of studies and judicial opinions is recited, no plaintiff could ever successfully challenge the evidentiary basis for a secondary-effects regulation. Albeit light, the burden on the government is not non-existent, and a plaintiff may put forth sufficient evidence to further augment that burden.

Id. at 524-25. *See also Entertainment Productions, Inc. v. Shelby County, Tenn*., 721 F.3d 729, 737 (6th Cir. 2013), *cert. denied*, 134 S.Ct. 906 (2014) ("States may not regulate erotic speech based upon evidence that is

nongermane or, worse, nonexistent. Post-*Alameda Books* case law confirms this.").

The Fifth Circuit, like the Sixth, also recognizes that the outcome of a case challenging a law claimed to be designed to ameliorate adverse secondary effects depends on the evidence. *Compare Encore Video v. City of San Antonio*, 330 F.3d 288 (5th Cir.), *cert. denied*, 552 U.S. 825 (2003) (striking down zoning law relating to retail-only adult businesses), *with H & A Land Corp. v. Kennendale,* 480 F.3d 336 (5th Cir.), *cert. denied sub nom. Reliable Consultants, Inc. v. City of Kennendale,* 552 U.S. 825 (2007) (distinguishing *Encore Video* based on the evidence and sustaining zoning law relating to retail-only adult businesses); *Illusions-Dallas Private Club, Inc. v. Steen,* 482 F3d. 299 (5th Cir. 2007) (reversing summary judgment because state failed to adduce evidence in support of its law).

The Ninth Circuit is no different. *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1194 (9th Cir. 2004) ("World Wide did not effectively controvert much of Spokane's evidence through McLaughlin's report or otherwise.").

Other circuits agree as well – evidence matters. *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 173 (2d Cir. 2007) ("Because defendants cannot show that they relied on relevant evidence of negative secondary effects before enacting the Ordinance, they cannot establish that the Ordinance furthers a substantial government interest.");

Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1169 (10th Cir. 2006), *appeal after remand*, 542 F.3d 787 (10th Cir. 2008) ("[A] review of the parties' evidence supporting and countering a city's rationale is essential to determining whether an ordinance is narrowly tailored to the City's substantial interest in preventing secondary effects."); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 747 (4th Cir. 2010) ("Evidence rebutting the government's justification for a secondary effects regulation . . . must convincingly discredit the foundation upon which the government's justification rests."); *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 882 (11th Cir. 2007) ("Lollipop's has failed to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the challenged ordinances. . . ."); *Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson County*, 492 F.3d 1164 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1762 (2008) (plaintiff's evidence cast doubt on county's rationale for adopting adult business regulation and warranted a trial).

The same is true of the state court decision cited by the Petitioner. In *Ocello v. Koster*, 354 S.W.3d 187, 206-207 (Mo. 2011), for example, the court explained the plaintiffs failed to meet their burden under *Alameda Books* in their challenge to a statute that imposed an array of regulations on adult oriented businesses. *See also Kentucky v. Jameson*, 215 S.W.3d 9, 35 (Ky. 2005) ("In this case, Jameson failed to present 'actual and convincing evidence' sufficient to cast 'direct doubt' on the fiscal court's rationale or

findings or that the secondary effects generally associated with sexually oriented businesses are merely a pre-textual justification for the suppression of protected expression."); *Chicago v. Pooh Bah Enterprises*, 865 N.E.2d 133, 158 (Ill. 2006) (argument and "testimony by Pooh Bah's experts was insufficient to trigger an obligation on the part of the City to supplement the record with additional evidence in support of its position.").

Petitioner also suggests the decision below conflicts with the decision of the Ninth Circuit in *Center for Fair Public Policy v. Maricopa County, Ariz.,* 336 F.3d 1153 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004), the Sixth Circuit's decision in *Deja Vu v. Union Twp. Board of Trustees*, 411 F.3d 777 (6th Cir. 2005), and that of the Missouri Supreme Court in *Ocello*, each of which sustained hours of operation restrictions. Pet. at 22-24.

That the outcome in this case is different than in other cases in which a similar restriction was challenged does not create a conflict. The outcome of a challenge to a law is not preordained. *Alameda Books* holds as much.

In *Fair Public Policy*, the Ninth Circuit examined the record as a whole and employed the *Alameda Books* plurality's burden shifting framework to the evidence. It concluded that on the record before it, the Arizona state legislature adduced sufficient evidence to meet its initial burden. When it turned to the second prong of *Alameda Books*'s burden shifting

framework – whether Fair Public Policy had cast doubt on that evidence – the court held it had not. "Fair Public Policy has failed to cast doubt on the states' theory, or on the evidence the state relied on in support of that theory." *Id*. at 1168.

While the court there held the proportionality analysis set out in Justice Kennedy's concurring opinion in *Alameda Books* did not apply to an hours of operation restriction, that conclusion was not dispositive; it was the evidence in the record that supported the asserted rationale for the law, and the lack of evidence undermining it, that led the court to sustain the law.

The Sixth Circuit's decision in *Deja Vu v. Union Twp. Board of Trustees*, 411 F.3d 777 (6th Cir. 2005), also claimed to represent a conflict with the decision below, presents no conflict. There, the court decided that the township met its burden under *Alameda Books*, and on that basis, affirmed the denial of a preliminary injunction. *Id*. at 791 ("This evidence can be said to 'fairly support [Union Township's] rationale for its ordinance.").

Here, Indianapolis's petition does not explain how the claimed rationale of a law to combat crime in the area around adult bookstores is not undermined by evidence showing that crime in the area around them goes up, rather than down, when they are required to be closed. The city's 2009 crime study undermined that rationale. The small number of crimes at the Bookstores themselves undermined that

rationale. The testimony of the city's vice officers undermined that rationale. And the Seventh Circuit, reviewing the entire evidentiary record, rightly concluded that Indianapolis's rationale for the closing hours restriction was undermined.

Even as to Annex Books, Indianapolis's petition fails to explain how the Ordinance's closing restriction is not undermined by evidence that none of the public indecency arrests took place between midnight and 10 a.m. or on Sunday, and by the testimony that a separate section of the law cured the issue of public indecency in the viewing booth area.

As to the latter observation, the Court's recent decision in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), is on point. There, the Court applied intermediate scrutiny and held a provision of a statute that imposed a buffer zone around the entrance to facilities providing abortions was not narrowly tailored, and thus, unconstitutional where a separate, less burdensome alternative contained in the very same law advanced the asserted governmental interest. Specifically, the statute struck down in *McCullen* had a provision that criminalized hindering or impeding access to a clinic. *Id*. at 2537. In addition, the Court pointed out, the state had available to it "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like," all of which were less burdensome alternatives available to it. *Id*. at 2538.

The same reasoning applies here. A separate provision of the Ordinance that required the viewing booth area at Annex to be reconfigured ameliorated completely the incidents of public indecency. App. at 117-18. In addition, the city's claim that reducing armed robberies justified the requirement that the bookstores close casts to one side the existence of general criminal laws prohibiting that conduct, which, like the anti-trespass laws and breach of peace laws the Court pointed to in *McCullen*, are less burdensome on speech.

In this case, the Bookstores were able to take the evidence that the City claimed justified its law and the restrictions it imposed and demonstrate that that evidence, in fact, undermined its asserted rationale.[6]

The difference in outcomes is fact-specific and evidence-dependent and does not create a conflict. For this reason alone, review should be denied.

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[6] The Seventh Circuit noted in its first opinion that Indianapolis had conceded at oral argument that none of the studies it offered in defense of the Ordinance involved retail-only businesses. Nor did its studies assess whether businesses having only 25% of their inventory, floor space or weekly revenue in sales from adult products were associated with adverse secondary effects. App. at 58.

II. INDIANAPOLIS PRESENTED NO EVIDENCE TO JUSTIFY THE REQUIREMENT THAT THE BOOKSTORES REMAIN CLOSED ALL DAY ON SUNDAY.

Separate and apart from the requirement that the Bookstores close during the overnight hours, the law requires them to be closed all day on Sunday.

Indianapolis came forward with no evidence to justify that provision. Its own crime study showed that violent/person crime in the 500 foot area around the Bookstores actually *increased* by 138% on Sunday. It also showed that at the stores themselves, Part I UCR crimes could not have served as a basis to force the stores to close on Sunday. Among *all* of the Bookstores during a more than 3-year period before the law was enforced, there were total of 8 crime incidents. There were 3 during a similar period afterwards.

Indianapolis's expert, moreover, was never even asked to analyze or render an opinion to justify the requirement that the bookstores be closed all day on Sunday, tr. 369-70, and none of the evidence on which the City stakes its claim to justify the Ordinance's requirement that the Bookstores be closed between midnight and 10 a.m. Monday through Saturday, have anything to do with Sunday.

Because the record is so clear on this point, this case is not worthy of the Court's review.

III. THE DEFINITION OF "ADULT BOOKSTORE" IN THE ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD.

There is an independent basis to support the judgment below, namely, that the Ordinance's definition of "adult bookstore" is overbroad. A law that regulates expression is unconstitutional on its face if its sweep is unnecessarily broad and if it threatens to ensnare within its reach substantially more constitutionally protected speech than necessary to further an important governmental interest. *Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729 (2011); *United States v. Stevens*, 130 S.Ct. 1577 (2009); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Legislation that regulates businesses based on the sexually oriented content of their expression may only be justified by governments on the theory that the law is aimed at ameliorating the adverse secondary effects claimed to be caused by those entities. And when such a law sweeps within its scope businesses and entities that are not shown to be associated with and are not claimed to cause adverse secondary effects, the law is impermissibly overbroad.

That is the case with the definition of "adult book store" employed in the Ordinance, which defines an adult bookstore as:

> an establishment having at least twenty-five percent (25%) of its:

> (1) Retail floor space used for the display of adult products; or
>
> (2) Stock in trade consisting of adult products; or
>
> (3) Weekly revenue derived from adult products.
>
> For purposes of this definition, the phrase adult products means books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records or other forms of visual or audio representations which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. For purposes of this definition, the phrase adult products also means a device designed or marketed as useful primarily for the stimulation of human genital organs, or for sadomasochistic use or abuse. Such devices shall include, but are not limited to, phallic shaped vibrators, dildos, muzzles, whips, chains, bather restraints, racks, non-medical enema kits, body piercing implements (excluding earrings or other decorative jewelry) or other tools of sado-masochistic abuse.

App. 104-05.

The term "specified anatomical areas," employed in that definition, in turn, is defined as, "less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breast below a

point immediately above the top of the areolae. . . ." App. 109. Thus, under the definition, expressive materials that depict or describe a partially covered buttocks are sufficient to trigger the law's application.

When, in 2003, Indianapolis broadened the definition of adult bookstore in its laws and brought within its scope businesses with 25% of their inventory, floor space or weekly revenue in, or from the sale of, "adult products," it did so with no basis to claim those businesses caused adverse secondary effects, a deficiency that it never addressed. App. 58. Indeed, the definition of adult products is broad, and includes items that can be purchased at Wal Mart, Walgreens, Krogers, and a host of other, non-adult businesses.[7] And because these products are included in that calculation, the percentage of constitutionally protected materials that a business sells could actually be much smaller and far less than that 25% threshold, but the business nonetheless could fall within the scope of the law.

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[7] *See* USA Today, "Many Chain Stores Now Add a Toy Aisle for Adults," 5/30/12, accessible at http://usatoday30.usatoday.com/news/health/wellness/story/2012-05-29/vibrators-and-sex-toys-sales/55289424/1 (last accessed 6/11/14); http://www.walmart.com/tp/vibrators (last accessed 6/10/14); http://www.walgreens.com/search/results.jsp?Ntt=vibrator (Last accessed 6/10/14); http://www.cvs.com/shop/Sexual-Health/Vibrators-&-Adult-Toys/Vibrators/_/N-3uZ13megwZ2k?pt=SUBCATEGORY; http://www.spencersonline.com/sex-toys/ (last accessed 6/11/14); http://www.cirillas.com/ (last accessed 6/11/14).

None of the studies Indianapolis relied on in enacting the Ordinance assessed the effect of stores that sell as little as 25% of adult products, App. at 58, and it introduced no studies or other evidence at the trial that showed the effect of stores that sell as little as 25% adult products. App. at 58.

Indeed, at trial, its expert acknowledged that a retail bookstore fortunate enough to generate a quarter of its weekly revenue from the sale of *50 Shades of Grey*, a figure substantial enough to bring it within the definition of "adult bookstore," fell outside the scope of his secondary effects theory and would not be associated with adverse secondary effects. Tr. 337.

The law is impermissibly overbroad.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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